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No. 91-687

In The
Supreme Court of the United States
October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Petition for a Writ of Certiorari to The Montana Supreme Court

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The brief filed by the respondent, Donald Imlay, simply reiterates the erroneous reasoning of the Montana Supreme Court, ignoring, as the state court did, the controlling authority defining the scope of the privilege against self-incrimination. If such reasoning is left to prevail and considered persuasive authority by other forums, treatment for criminal offenders will be severely restricted.

I.

The state court and the respondent have disregarded controlling considerations and precedent, and instead have relied upon the outdated and readily distinguishable case of *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). In *Thomas*, and the other similar cases relied upon by the Montana Supreme Court and the respondent, the setting was a defendant's allocution, at which a defendant is given the chance to speak before sentence is imposed. These cases all involved defendants who were pressured by a sentencing judge while in a courtroom to either confess or accept a harsher sentence. The actions of the sentencing judges were criticized in these cases because the coercive and threatening circumstances were viewed as compelling the defendants to either confess or suffer the penalty of a harsher sentence.

In this case the statements were requested in a treatment setting. Imlay was not placed inquisitorially before a sentencing judge and told to confess or else go to prison. He was given a suspended sentence in the hopes that he would be amenable to treatment and possibly rehabilitated. It is for this reason that the discussion of the Fifth Amendment privilege in *Allen v. Illinois*, 478 U.S. 364 (1986), is controlling. *See* Pet. at 13-15.

This case is also distinguishable from *Thomas* because Imlay did not assert his Fifth Amendment privilege prior to sentencing, but after he began serving his sentence. Imlay has never attacked his conviction. The matter surfaced during an appeal before the Montana Supreme Court concerning the propriety of the revocation of his probation. Given this distinction, *Murphy v. Minnesota*, 465 U.S. 420 (1984), not *Thomas*, is controlling. *See also*

United States v. Gonzalez-Mares, 752 F.2d 1485, 1489-90 (9th Cir. 1985) (citing *Murphy* for the general rule that a probationer is not entitled to invoke the privilege against self-incrimination in response to questions about probation status); *Wilson v. State*, 621 P.2d 1173 (Okla. Crim. App. 1980) (revocation proceeding is not a criminal proceeding for Fifth Amendment purposes); *State v. Burow*, 394 N.W.2d 665, 667 (Neb. 1986) (quoting *Murphy* and holding that the privilege against self-incrimination affords no protection in a probation revocation proceeding).

Moreover, as discussed in the petition, the significance of *Thomas* and similar older cases is notably diminished in light of the adoption of the federal sentencing guideline which allows for a reduction of the sentence for acceptance of responsibility by a defendant. *See* § 3E1.1, U.S.S.G.; *United States v. Mourning*, 914 F.2d 699 (5th Cir. 1990); Pet. at 10, n.10.

II.

Quoting the Montana Supreme Court, the respondent maintains that Imlay was placed in a coercive situation because he would be abandoning the opportunity to challenge his conviction through newly discovered evidence or through collateral attack if he were to discuss the crime during sex offender treatment. Imlay Br. at 5. Such an assertion ignores the general rule that once a person is convicted of a crime, he no longer may assert the privilege against self-incrimination with regard to those acts because he can no longer be incriminated by his testimony about the crime. *Reina v. United States*, 364 U.S. 507, 513 (1960).

This Court has long held that the threat of incrimination must be "real and appreciable." *Brown v. Walker*, 161 U.S. 591, 599-600 (1896); *Rogers v. United States*, 340 U.S. 367, 374-75 (1951). *Murphy, supra*, echoes this reasoning in holding that the threat of probation revocation would be permissible "if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding." (Emphasis added.) 465 U.S. at 435, n.7. Here, there is no real and appreciable threat of incrimination in a separate criminal proceeding because the information sought in treatment concerned only the crime for which Imlay had been convicted. Nor is there a realistic possibility of Imlay challenging the conviction through discovery of new evidence.

While this Court has not directly resolved the issue of whether the privilege of self-incrimination extends to collateral attacks, the Supreme Court of Kentucky has firmly held that it does not. In *McQueen v. Commonwealth*, 721 S.W.2d 694, 703 (Ky. 1986), and *Gall v. Commonwealth*, 702 S.W.2d 37, 45 (Ky. 1985), the Kentucky Supreme Court relied upon the general rule enunciated in *Reina, supra*, and held that a petitioner was not entitled to invoke the privilege against self-incrimination in a postconviction or collateral attack. *See also United States v. Heldt*, 668 F.2d 1238, 1253 (D.C. Cir. 1981) (grand jury witness may not invoke privilege of self-incrimination with respect to crimes of which he was already convicted).

Two states have taken the approach that resolution of the issue must be determined on a case-by-case basis and turns upon whether there is a "real and appreciable" danger of self-incrimination that would jeopardize collateral relief. *State v. Verdugo*, 602 P.2d 472 (Ariz.

1979) (threat of incrimination was "imaginary and insubstantial" because the appellant's conviction had been affirmed on appeal four years earlier, no petition for postconviction relief had been filed, and defense counsel estimated that the likelihood of success on collateral attack was only 15 to 30 percent); *Commonwealth v. Rodgers*, 372 A.2d 771 (Pa. 1977) (determination of whether witness whose conviction has been finalized on appeal and who is preparing a collateral attack may invoke privilege against self-incrimination is left to discretion of trial court); *Commonwealth v. Strickler*, 393 A.2d 313 (Pa. 1978); *see also McCormick on Evidence* § 121, at 290-91 (3d ed. 1984).

While the State of Montana maintains that the Kentucky decisions are correct, and that Imlay may no longer invoke the privilege against self-incrimination with respect to the crime for which he was convicted, there is also no realistic threat of self-incrimination through Imlay's seeking collateral relief. Imlay has never challenged his conviction. His appeal to the Montana Supreme Court involved solely a challenge to his sentence and the revocation of his probation. Because he has never challenged his guilt, no harm can result from discussion of the crime for which he was convicted and there can be no real or substantial threat to the privilege against self-incrimination in collateral proceedings.

The privilege against self-incrimination is not based upon some ethereal possibility. The threat to the privilege must be both real and substantial. There has never been an indication or even a suggestion that such a threat exists in this case. The Montana Supreme Court's concern about collateral relief is not a significant, much less controlling, consideration.

III.

The importance of review in this case is highlighted by the Montana Supreme Court's disregard of controlling federal precedent on the privilege against self-incrimination. By erroneously applying the *Thomas* decision to this case the Montana court has placed itself in conflict with decisions of this Court, other state courts, and numerous federal circuit courts, including the Ninth Circuit Court of Appeals.

Moreover, the effect of the state court's decision on treatment programs in the State of Montana and throughout the nation is potentially monumental. To legally prevent treatment programs from requiring discussion of pertinent behavior strips from the programs their most effective tool of breaking through the denial that so often accompanies the behavior. The result of the state court's decision is that offenders will be warehoused and meaningful treatment will be precluded. Review of the Montana Supreme Court's decision is therefore necessary to preserve and protect a criminal defendant's opportunity for effective treatment and rehabilitation, and to affirm a state's prerogative to promote and require such treatment.

CONCLUSION

For these reasons, the reasons articulated in the petition, and the reasons set forth by the 20 states who have joined Montana as *amici curiae* in this matter, the State of Montana requests the writ to issue.

Respectfully submitted,

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